

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL D. McCROY,

Defendant.

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8:09CR272

MEMORANDUM AND ORDER

This matter is before the court on the defendant's motion to vacate under 28 U.S.C. § 2255. Filing No. 240. Under Rule 4 of the *Rules Governing Section 2255 Proceedings for the United States District Courts*, the court must perform an initial review of the defendant's § 2255 motion. See *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 4(b) (2011 Ed.). The rules provide that unless "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief," the court must order the United States Attorney to respond to the motion. *Id.*

The defendant entered a plea of guilty to Count II of an Indictment for assaulting and tasering a security guard and brandishing a firearm while robbing a bank in violation of 18 U.S.C. § 2113(a) and (d) and 2. The defendant was sentenced to 180 months on Count II. In his § 2255 motion, the defendant alleges that he received ineffective assistance of counsel (Ground 1) with respect to his first counsel, Steven Achelpohl, and prosecutorial misconduct regarding Steven Achelpohl (Ground 2); and his second counsel, Matthew F. Heffron, on the grounds of ineffective assistance of counsel (Ground 3).

On initial review, the court finds that it does not plainly appear that the defendant is entitled to no relief, and that the government should be required to answer. On receipt of the government's answer, the court will determine (a) whether to order the parties to submit briefs on the merits, so that the defendant's claims may be resolved on the basis of the record and briefs, or (b) whether an evidentiary hearing is required. *See Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 8(a) (2011 Ed.).

THEREFORE, IT IS ORDERED:

1. On initial review, the court finds that summary dismissal is not appropriate.
2. The United States shall file an answer to the defendant's § 2255 motion, Filing No. 240, within 21 days of the date of this order.
3. Defendant's motion for status, Filing No. 241, is denied as moot.

DATED this 3rd day of February, 2012.

BY THE COURT:

s/Joseph F. Bataillon
United States District Judge